IMCO/International Measurement & Control Company, Inc. *and* Chicago and Central States Joint Board, Amalgamated Clothing and Textile Workers Union. Case 13-CA-19837

May 28, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 26, 1981, Administrative Law Judge Robert T. Wallace issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, IMCO/International Measurement & Control Company, Inc., Frankfort, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following as paragraphs 2(c) and (d) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from its files any reference to the discharge, layoff, or refusal to recall of Lindy Schroba, Barbara Fretts, Rita Lannon, and Arlene Dahlman and notify each of them, in writing, that this has been done and that this unlawful conduct will not be used as a basis for future personnel actions concerning them."

"(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT penalize or otherwise discriminate against employees for engaging in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for supporting the Chicago and Central States Joint Board, Amalgamated Clothing and Textile Workers Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's Decision, as modified herein, Member Hunter does not rely on the discussion of *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), and similar cases involving conduct by an individual employee.

[2] The Administrative Law Judge found that Respondent violated Sec. 8(a)(1) and (3) of the Act by closing its facility on the afternoon of April 16, 1980. The complaint specifically alleged such conduct to be unlawful. We agree that Respondent violated Sec. 8(a)(1) in this respect but we find it unnecessary to decide whether such conduct violates Sec. 8(a)(3) inasmuch as the remedy would be unaffected.

We also find no merit in the General Counsel's cross-exceptions that Respondent has committed independent 8(a)(1) violations which were not referred to in the complaint.

[3] We have modified the Administrative Law Judge's recommended Order by adding the affirmative requirement that Respondent expunge from its records any reference to the unlawful discharges and similar conduct committed by Respondent. Respondent is also required to provide written notice of such expunction to those affected and to inform them that Respondent's unlawful conduct will not be used as a basis for future personnel actions concerning them. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

The recommended Order is further modified to include a narrow cease-and-desist order. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

WE WILL make all employees (including Lindy Schroba, Barbara Fretts, Rita Lannon, and Arlene Dahlman) whole, with interest, for the loss of pay suffered as a result of our punitive closing of the plant on the afternoon of April 16, 1980.

WE WILL offer to Lindy Schroba, Barbara Fretts, and Rita Lannon immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, with interest, for any loss of earnings they may have suffered due to the discrimination practiced against them.

WE WILL expunge from our files any reference to the discharge, layoff, or refusal to recall of Lindy Schroba, Barbara Fretts, Rita Lannon, and Arlene Dahlman and notify each of them, in writing, that this has been done and that our unlawful conduct will not be used as a basis for future personnel actions concerning them.

IMCO/INTERNATIONAL MEASUREMENT & CONTROL COMPANY, INC.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge: Upon a charge filed by Chicago and Central States Joint Board, Amalgamated Clothing and Textile Workers Union (the Union) against IMCO/International Measurement & Control Company, Inc. (the Company or Respondent), a complaint was issued on July 16, 1980, in which it is alleged that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by laying off three employees (Lindy Schroba, Barbara Fretts, and Rita Lannon) because they engaged in protected concerted activities. The case was heard before me at Chicago, Illinois, on February 17 and 18, 1981.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Illinois corporation, annually ships goods valued in excess of $50,000 directly from its plant in Frankfort, Illinois, to customers located outside the State. It admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent produces electronic presses. It was incorporated in 1969 and is owned and managed by the Dybel family, having evolved from a basement operation in Frank Dybel's home. The latter is president, his wife and daughter do the general office and bookkeeping work, and the day-to-day operations (including, since February 25, 1980, supervision of plant personnel) are managed by his son, Bill. The latter also serves as vice president. Both Frank and Bill Dybel work from 14 to 16 hours daily and often longer when circumstances require.

In 1978 the Company purchased and moved to a newly constructed plant on a 5-acre site in Frankfort, and since that time the plant has undergone constant modification and expansion. However, in late 1979 and continuing through the second quarter of 1980, the Company experienced a sharp decline in sales;[2] and to economize during that period, the Dybels drew virtually no salaries or dividends and they reduced employment levels of assembly and shop workers from 18 in October 1979 to 8 in July 1980.[3] Principally as a result of those efforts, the Company is shown to have earned a net profit after taxes of $74,300 during the first 6 months of 1980, up from $31,257 earned during the same period in 1979. In addition, the Dybels increased their capital investment in the Company by $60,000.

In April 1980, two things happened which ultimately gave rise to this proceeding. The first was on or about April 8 when Frank Dybel received and posted for reviewing by employees a standard notice that a petition for a representative election had been filed with the Board. He immediately called a meeting of employees and told them that while they "would be better off with us . . . it was their inherent right to be able to form a union."[4] Assertedly, neither Frank nor Bill Dybel had any prior knowledge of employee interest in unionization, nor did they ever know or inquire as to the preference of employees in that regard.

The second matter involves events occurring on April 16, but before describing those events an understanding of Dybels' fondness for stray cats is necessary. Although varying in number from month to month, in April there were at least eight such cats in the plant. During working hours the "bad" cats are confined to a loft and the "good" cats ("Morgan," "Yates," "Big Tabby," etc) have free access to all areas at all times. Among numerous provisions made for the cats are tiled floors, epoxied walls, and a hole in the wall for easy entrance to and

[1] The General Counsel's unopposed motion to correct the transcript, dated April 13, 1981, is granted and received in evidence as G.C. Exh. 8.

[2] Gross revenues earned during the first 6 months of 1980 were $479,434 vs. $713,446 for the same period in 1979.

[3] With the exception of the three alleged discriminatees who were laid off, these personnel reductions appear to have been accomplished solely by attrition.

[4] On cross-examination he expressed his view more forcibly, as follows:

> [I will] give them the union anytime they want it. . . . This is the intent of the goddamn government, and that's what I told them . . . . We don't mind them having a union; making us pay for all this horseshit, you understand.

egress from the building. Although there is no regular maintenance program, Frank Dybel attempts to clean the plant everyday. But a thorough cleaning (which usually takes 4 to 6 hours) most often occurs just before visits by important customers. Also, employees are expected to clean up messes around their areas as need arises, and for that purpose brooms and mops are readily available. The Dybels affection for the cats is such that job applicants will not be hired if they have allergies or otherwise are incompatible with cats; and employees who have complained to the Dybels about the cats were told that they could either clean up the messes themselves or quit.

On April 16 at about noon two agents of the local Department of Health appeared before the locked front door of the plant and told Frank Dybel that they had come in response to a complaint to inspect sanitary conditions at the plant. Without opening the door, Frank told them to return the next day. Although the agents had not said the plant had to be closed down, Frank immediately instructed the employees, through Bill, to go home, stating that "we can't have anybody here if it's unsafe," and thereafter he proceeded to clean the plant, a process which took about 2 hours longer than a normal thorough cleanup. The Dybels claim they had no idea as to who might have filed the complaint and, assertedly, they viewed it no differently than other complaints filed since operations were moved to the Frankfort facility.[5]

Bill states that he viewed the occasion as an opportune time for effecting a layoff he had been considering since January in light of declining sales. So that evening, assertedly acting on his own initiative and without consultation with his father, he instructed his sister to inform specified employees to report to work as usual on the next morning. Those recalled[6] included all shop and assembly employees except the three alleged discriminatees and Arlene Dahlman. Ostensibly, Bill chose the three alleged discriminatees for layoff because, for the most part, they were doing "busy work" of a kind soon to be accomplished by newly purchased machinery. In addition, they required more supervision ("babysitting,") than he was able to provide, especially as he was going to be away from the plant during the following week.[7] He admits, however, that he had little opportunity to train employees or observe them at work, that most of their training was accomplished under a "show and tell" system whereby more experienced employees would volunteer information to workers in need of help, and that he failed to recall Arlene Dahlman through an oversight (i.e., he knew her only as "the girl in the corner, or the blond sitting there) and inadvertently omitted that description when he instructed his sister regarding those to be recalled.

Plant operations resumed on April 17 and during that day the facility was inspected and found clean by the department of health.

The employees who had been laid off had signed union cards. They had openly discussed the Union among themselves and with other employees in the lunchroom at various times between April 1 and 15, sometimes while the Dybels were passing through. One employee, Lindy Schroba, had worked in the assembly area on March 26. Although the room was large (about the size of a small theater) and air-conditioned, there was a strong odor from cat messes. She opened a door to obtain additional ventilation and later told Bill Dybel that she was getting sick from the smell. His only response was "not to touch anything," apparently in reference to her opening the door. On April 2 she phoned the health department and complained about the cats.

Arlene Dahlman had worked for the Company for 20 months. At about noon on April 16 she and other employees were told to go home because someone had complained about the cats and the plant had been shut down by the health department. She returned to work on April 18 after having called and been told to do so on the prior afternoon. After punching in she went directly to the office and asked Bill Dybel why she and the others had not been asked to work on April 17. He pointed to the Board's "Notice to Employees" and said: "It is very difficult for me to talk to you because of this thing on the wall . . . . They claim to have a majority of signatures but we know which people are pro-IMCO and the numbers don't jibe . . . we have had to hire a lawyer and it is costing us a thousand dollars a day . . . business was bad and they had this big, new building to pay for . . . we have had a lot of harassment since we moved to Frankfort. You know that the cat complaint was unnecessary . . . we have to get rid of troublemakers . . . we know young people cause problems." After conceding that her work and attendance had been "excellent," he added: "You should feel good because some of your fellow employees spoke up for you." Again she asked why she had not been called back with the others, and Bill responded that "it was late when they called people and it might have been a slip-up, that his father didn't know people's names and he apologized . . . [saying] that sometimes innocent people get hurt." On the other hand, Bill states that she entered his office uninvited and that the conversation mostly was one-sided on her part. She was crying and kept saying over and over again that she did not understand why she was not called back with the other people. He apologized and told her it was an oversight. Finally, he said: "I really can't talk to you about any of this stuff, because there is a notice on the board that says you're not supposed to talk to anybody about firing or hiring or anything, and I was also advised that you're not supposed to talk to employees about this stuff when this situation occurs." About an hour later she returned and told him she could not continue to work there. Bill replied, "O.K.," and she left the Company. I accept Arlene Dahlman's version of

[5] One such complaint was filed with the Federal Occupational Safety and Health Administration relative to an overflowing toilet, and others were filed with local authorities regarding lack of ceiling insulation and covers for electrical outlets. Employees assertedly were sent home in connection with the complaint to OSHA, but Frank Dybel's testimony in that respect is contradictory.

[6] The recalled employees were docked approximately 3-1/2 hours each for their absence on the afternoon of April 16.

[7] In particular, Bill Dybel states that Barbara Fretts would put her feet up on chairs, did poor quality work, and gave nasty answers when criticized; that Rita Lannon's work had gone down in quality; and that Lindy Schroba was negligent in inspecting work she was doing and twice carelessly put holes in a sink with an airbrush.

the conversation. She appeared calm and candid on the witness stand; and her testimony remained consistent throughout cross-examination. In addition, she had no expectation of financial gain.[8] In contrast, I find incredible Bill Dybel's admitted reluctance to tell Arlene Dahlman why he failed to recall all employees in light of his assertion here that the layoff was solely for economic reasons and had nothing to do with the Union or the cat complaint. In that regard, I view his restrictive interpretation of the Board's standard "Notice to Employees" that a petition for a representative election had been filed as entirely self-serving and patently unwarranted by the language contained therein.

Barbara Fretts had been employed by the Company for 8 months. She visited the plant on the afternoon of April 18 and asked Frank Dybel if she would be called back. He told her that the plant had been shut down by the health department and advised her to talk to that agency, adding: "If they say we can reopen you can come back to work." She asked if he was accusing her of filing the complaint about the cats and he responded: "Well, did you?," and then walked away. I accept her account of the conversation. It was overheard and corroborated by another employee (Jill Potts) who had worked for the Company for 4 years and resigned in October 1980;[9] and it was not denied by Frank Dybel. The latter's only comment was that he had been without sleep for 36 hours and might have said anything.

Lindy Schroba worked for the Company for 2 months. She visited the plant on April 21 and was told by Frank Dybel that she was not fired, just laid-off because business was slow. Rita Lannon had been employed for 2 years. After Bill Dybel assumed supervisory duties she continued to do the same types of work that she had done before. She had shown other employees (including Barbara Fretts and Lindy Schroba) how to do particular jobs, and at times had inspected work performed by others. The three each disclaim receiving any criticism of their work, although Lindy Schroba admits having inadvertently caused some damage to the sink.

Bill Dybel characterized the Company's business as sporadic. At the time of the layoffs (April 16) the Company was advertising in newspapers for job applicants, assertedly to have an adequate pool of potential employees when business improved. On April 28 the Union withdrew its representation petition. Thereafter, on May 9 and continuing to July 4, the Company inaugurated a policy of paying a weekly bonus of $20 to each of its employees, and beginning on July 4 the bonuses were converted into permanent raises. In late 1980, the Company obtained an $8 million contract, and between December 26, 1980, and January 23, 1981, it hired four new assembly room employees. The three alleged discriminatees have never been recalled.

[8] Although Arlene Dahlman was named as a discriminatee in the charge, the Regional Director expressly declined to include in the complaint any allegation that she was constructively discharged.

[9] Jill Potts also testified that on April 17 there was a 45-minute meeting at the plant attended by all the employees who had been called back. During that meeting Frank Dybel assertedly told the employees, among other things, that they could have the Union if they wanted it; that he did not want to move the plant; and that business was bad and many companies were moving out of the area. Frank flatly denies that meeting took place. Although I credit Jill Potts, I find her brief description of the subject matter of the meeting far too generalized to support a finding of independent unfair labor practices arising therefrom.

III. ANALYSIS AND CONCLUSIONS

It is unfortunate that the dedication and resourcefulness displayed by the Dybels in developing the technical proficiency of the Company has not been accompanied by due respect for the protected rights of employees. For on this record, it is abundantly clear that the plant shutdown on the afternoon of April 16 was intended to punish all employees by the loss of approximately 3-1/2 hours pay each because one or more had the temerity to complain to the local department of health concerning unsanitary conditions arising from the presence in the plant of the adopted stray cats. Concerted action by employees in complaining of safety or sanitary conditions in the workplace is protected under the Act. *Carbet Corporation*, 191 NLRB 892 (1971), enfd. 80 LRRM 3054, 68 LC ¶ 12,845 (6th Cir. 1972); and this is so even when the complaint is lodged by an individual employee because the subject matter affects conditions in the workplace of concern to all employees. See *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); *Anheuser-Busch, Inc.*, 239 NLRB 207 (1978). Here, and contrary to the Dybels' assertion to the employees, the department of health had not required closure of the plant. Nor did the conditions complained of require closure. It appears, therefore, that the mass layoff on April 16 was in the nature of a reprisal; and that circumstances, together with the fact that the Dybels were aware that a number of employees had complained about cat effluvia, warrants an inference that they acted in the belief that the "cat complaint" was the product of concerted action by employees and for the purpose of discouraging any repetition in the future. I recognize that in being hired employees had to agree to work in an environment with cats, but they did not thereby forfeit their right collectively to protest unsanitary conditions arising from the presence of cats. Compare, *Louisiana Council No. 17, AFSCME, AFL-CIO*, 250 NLRB 880 (1980).

It is apparent also that the shutdown on April 16 was used as an occasion to discharge the three named discriminatees (and the layoff of Arlene Dahlman) for their activities between April 1 and 15 in support of the union organizing effort. All had signed union cards and openly advocated unionization to other employees in the plant lunchroom. The Dybels' disclaimer of any knowledge of their participation is unconvincing in light of their acute perceptiveness in regard to all other matters involving plant operations. It is also inconsistent with Arlene Dahlman's testimony (heretofore credited) that Bill Dybel told her on April 17 that "They claim to have a majority of signatures but we know which people are pro-IMCO and the numbers don't jibe."

Similarly, the Dybels' claimed indifference as to whether employees opted for the Union is belied by Bill Dybel's further statement to Arlene Dahlman to the effect that the unionization effort was costing the Company $1,000 a day for a labor relations lawyer, and by Frank Dybel's characterization of the governmentally

protected right of employees to organize as "all this horseshit." Those statements, together with their dramatically timed meeting with the remaining employees on April 17 to discuss the Union option, and the weekly across-the-board bonus/raise policy implemented within a fortnight of the union's withdrawal of its representation petition, evince a keenly felt animus toward unionization which motivated the discharge of the named discriminatees.

In light of the above, I am not persuaded that the asserted reasons for the "layoffs" are anything other than mere *post facto* rationalizations or pretexts. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 150 (1980). Those reasons were not given to the discharged employees. Instead, their inquiries were met with silence or ambiguity. Further, the Company has failed adequately to support its claim that the "layoffs" would have occurred in any event because of declining sales. That situation was not unprecedented in light of Bill Dybel's comment that the business of the Company was "sporadic"; and retrenchment of personnel in the past appears to have been accomplished only by attrition. Indeed, at the time of the "layoffs" the Company was anticipating an upswing in sales because it was running ads to secure an inventory of available employees.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) and (3) of the Act (1) by voluntarily closing its facility on the afternoon of April 16, 1980, and depriving its employees of pay for work they otherwise would have performed on that afternoon in retaliation for protected concerted action by employees, to wit: filing a complaint with the department of health concerning sanitary conditions at the facility;[10] and (2) by discharging Lindy Schroba, Barbara Fretts, and Rita Lannon because of their support for the Union, and for the purpose also of discouraging support for the Union by other employees.

The aforesaid practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action will include an Order (1) to pay all employees (including Lindy Schroba, Barbara Fretts, Rita Lannon, and Arlene Dahlman), with interest, for the time they would have worked on the afternoon of April 16, 1980, had the plant not been closed down; and (2) to offer Lindy Schroba, Barbara Fretts, and Rita Lannon immediate and full reinstatement with backpay computed on a quarterly basis in the manner provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as established in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Penalizing or otherwise discriminating against employees because they engaged in protected concerted activities.

(b) Discharging or otherwise discriminating against employees for supporting the Chicago and Central States Joint Board, Amalgamated Clothing and Textile Workers Union, or any other labor organization.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Make all employees whole, with interest, for the loss of pay they suffered as a result of the punitive closure of the plant on the afternoon of April 16, 1980.

(b) Offer Lindy Schroba, Barbara Fretts, and Rita Lannon immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings or benefits in the manner set forth in "The Remedy."

(c) Post at its place of business in Frankfort, Illinois, copies of the attached notice marked "Appendix."[12] Copies of said notice on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[10] While only three discriminatees are named in the complaint, all employees who were sent home early on April 16 were aggrieved by the plant closing; and that circumstance warrants the broader finding and remedy entered herein. Compare *Omark-CCI, Inc.*, 208 NLRB 469 (1974).

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."